30 October 2020

ACCC's CDR rules expansion amendments consultation paper

By email: ACCC-CDR@accc.gov.au

Thank you for the opportunity to provide a submission in response to the ACCC's CDR rules expansion amendments consultation paper.

ARCA is the peak industry association for businesses using consumer information for risk and credit management. As such, although many of our Members are 'data holders' under the CDR regime, our comments on the proposed rules expansion amendments are primarily focussed on the ability of credit providers to access and use data under the CDR rules, either as an accredited data recipient or using a third party (i.e. an 'intermediary').

On that basis, we generally welcome the proposed changes – subject to our comments below - as they will make more data available through the CDR and go some way towards improving the ability of participants to use that data.

However, we note that the changes are likely to require significant effort from data holders to implement. We support the comments made by numerous stakeholders during the Data61 CDR Implementation Weekly Call on 22 October (22 October meeting) regarding the need for an appropriate implementation period, that recognises the significant work that data holders are still required to undertake in respect of the existing CDR requirements, these new requirements and many other 'compliance' projects underway. We also note that the current COVID-19 pandemic is impacting participants' ability to implement changes.

Summary

While we believe that the changes proposed in the consultation paper will improve the CDR system, we consider that there are fundamental issues with the existing framework that must first be addressed. Without change, the CDR regime will not support important and legitimate uses of the CDR data by businesses and adoption of the regime will be limited, and businesses will rely on existing business models and sources of data (e.g. 'screen scraping').

We have three distinct, however interrelated, concerns regarding the way the existing rules operate:

- The consent rules do not give a businesses a clear and certain ability to access the complete set of data, or obtain the appropriate use and disclosure consents, it needs to provide the good or service to the particular customer;
- The consent rules, particularly those relating to deidentification, do not allow for a business to develop a large, representative data set on which to undertake analysis to

develop models and algorithms to improve the provision of their products and services; and

- The "data minimisation principle" potentially does not permit the business to use the data sets compiled by the accredited data recipient to undertake the analysis to develop models and algorithms to improve the provision of their products and services. While the proposed 'research' rules are a partial solution, they apply significant obstacles in the way of businesses' ability to use the data for those purposes and still fall well short of the needs of business.

We discuss these in further detail below. In addition, we have provided specific feedback in relation to the restricted accreditation levels and trusted adviser proposals within the consultation paper.

Consent framework: clear and certain ability to access and use CDR data

We recognise that consumer 'consent' is the basis upon which the CDR regime is founded. However, we are concerned that the way this concept has been incorporated in the rules will significantly diminish the value of the CDR regime to the Australian economy.

The requirement to itemise and obtain separate consents in respect of each data set, account, use and disclosure (including to intermediaries) will mean that a business may not have all the necessary consents to collect, use and disclose data in order to provide the good or service to the customer (i.e. the customer may choose to provide some consents and not others – even where those choices may be inconsistent given the product or service they are considering).

Of course, a business will want to acquire as many customers as possible and would prefer to provide the good or service even if the customer does not provide all consents. In respect of credit (where the credit provider will seek to rely on CDR data for the risk assessment and verification purposes), it is likely that many credit providers may offer alternative means of filling any 'gaps' in the consents (e.g. relying on other data collection methods such as screen scraping or provision of PDF account statements) However, given the lack of a clear and certain ability to access and use the CDR data (and the need to also use alternative sources), there is also a real possibility that the credit provider will simply solely rely on those other methods of collecting data instead of the CDR (noting the credit provider's subsequent use of that data will be subject to the much less restrictive Australian Privacy Principles).

The lack of a clear and certain ability to access and use data will impact new and innovative businesses more than incumbents, which are likely to have pre-existing means of collecting data. For example, it would be difficult to start a new, online-only lending business that is based on obtaining all necessary information for assessing credit applications via the CDR. This problem is compounded by the expectation under the CX guidelines that an accredited data recipient should not make the provision of the good or service 'conditional' on the customer providing those consents.[1] In practice – based on the consent framework and the expectation within the CX guideline – any such business would need to develop alternative methods of collecting data to fill the gaps resulting from the CDR rules. Again, such a

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[1] While not mandatory, we expect that an accredited data recipient would need to clearly describe why they are not acting in accordance with the guidelines – where the guidelines themselves provide little assistance on when an exception is appropriate. We note also that the Australian Financial Complaints Authority may treat the guidelines as "good industry practice" which can form the basis of a determination against a participant.

business is likely to consider that it would be a better use of resources to develop those alternative methods of data collection (in particular screen scraping) rather than participate within the CDR regime.

> **Recommendation 1:** If there are a 'bundle' of consents that are necessary for a business to provide the good or service to the customer, the rules should permit the business to present that 'bundle' as one consent (where that bundle may involve all relevant 'types' of consent as described in the proposed rule 1.10A).

> **Recommendation 2:** The ACCC provide additional clarity on when it is appropriate for an accredited data recipient to present 'consent' as a precondition of providing the good or service.

Consent framework: data set available for analysis and modelling

One of the key benefits of the CDR system to the Australian economy is the potential to give more businesses access to a large set of consumer data with which to develop predictive models and other tools to drive the economy. Such tools could involve product development, marketing or, in the case of lending, risk assessment.

The process for developing those models and other tools will involve the analysis of large data sets. However, for the models to be of any value (i.e. be predictive), the data that sits behind the analysis and modelling must be representative (or, at least, the biases within the data must be understood).

In its current form, the CDR Rules will not provide accredited data recipients with large, representative data sets that support their analysis and modelling. The data sets available to accredited data recipients will – because of the rules that require itemised and separate consents – potentially be a hodgepodge of incomplete information; whether because the consumer only provided limited 'collection consents', or the consumer provided 'use consent' for some purposes but not 'analysis' purposes, or the consumer denied or removed consent to de-identify their data.

Understanding that patchwork of data, in order to create predictive models, will be challenging as the gaps in the data will reflect a diverse range of choices made by different consumers, and these choices may introduce significant bias into the overall sample. Ironically, any attempt to understand and predict the consumer behaviours which sit behind those choices would be prevented by the same rules that caused the problem in the first place. That is, a consumer who is unwilling to agree to their data being used, for example, to develop a credit scoring algorithm, is unlikely to agree to their data being used to understand the reasons for *that* refusal.

The CDR data will still be a useful input into an *existing* model, such as an existing credit scoring algorithm used by a the credit provider to decide whether to lend to that particular customer. However, the model will already have to exist and, therefore, the credit provider will already need access to a large, representative data set to first develop the model. For this reason, larger, established businesses will not need to rely on the CDR to develop their models. They will develop those models using their existing account data and simply use the CDR data as an input into the model to acquire new customers. Smaller and challenger businesses will therefore be left at a disadvantage given they will lack this existing account data, or where the data is available it may be for a small customer segment only.

Our Recommendations 1 and 2 will go some way to addressing this issue as they will help to ensure the business will be able to collect all the necessary consents when they first establish the relationship with the customer - although, we note that the ability for the customer to subsequently withdraw such consents (particularly those relating to the deidentification of data) will continue to cause problems.

> **Recommendation 3:** In addition to Recommendations 1 and 2 that will give more certainty to a business when first providing the good or service, the ACCC should engage with stakeholders and review the rules relating to the removal of consents (particularly those relating to the deidentification of data) .

Data minimisation principle: prohibition on analysis and modelling using CDR data

As noted above, one of the key benefits of the CDR regime is to give businesses access to a large set of consumer data to analyse. This could involve the development of new goods or services or, importantly, the development and improvement of the particular good or service being taken out by the consumer (i.e. where the benefit of that development would be made available to other, subsequent customers).

However, even if an accredited data recipient has access to such a data set, we consider that the current drafting of the "data minimisation principle" prohibits such uses (regardless of whether the customer has consented) as the activity does not relate to the provision of "the goods or services" to the customer. While the proposal in 7.7 of the consultation paper relating to 'research' are a partial solution, they apply significant obstacles in the way of businesses' ability to use the data for those purposes.

Concerns with current drafting of data minimisation principle

The current drafting of the data minimisation principle only permits the collection and use of data that is "reasonably needed in order to provide the requested goods or services" (rule 1.8).

We note that there is a significant lack of clarity in the meaning of the words "in order to provide the requested goods or services".

Importantly, it is unclear whether the "requested goods or services" means the actual good or service to be offered to the customer (i.e. the contract entered into with the customer or the "account" issued to the customer), or to the product "type" that is being sought by the customer (i.e. so the accredited data recipient could use the customer's CDR data to refine or improve the provision of that product "type" to other/subsequent customers).

If the meaning of "requested goods or services" is limited to the actual contract or account offered to the customer ("account interpretation"), the data minimisation principle would prohibit important and necessary tasks regardless of whether consent is obtained, such as using the CDR data of a customer (whether or the accredited data recipient intended to

deidentify the data[2]) to create, review or refine[3] credit scoring algorithms (i.e. because those uses do not relate to the provision of the "account" to the customer).[4]

If the meaning of "requested goods or services" allows the CDR data to be collected or used for the purposes of refining or improving the provision of the product "type" sought by the customer for the benefit of other/subsequent customers ("product type interpretation"), how would the "type" be defined for a participant which offers a range of goods or services? For example, Bank A offers a range of consumer credit products, including credit cards, personal loans and home loans. If – assuming the product type interpretation is correct - a customer applies for a "Low Rate Visa credit card" and consents to Bank A collecting and using their data to refine or improve credit scoring algorithms would this be limited only to those algorithms created in respect of the "Low Rate Visa Card"? Or would it permit that CDR data to be used to create, review and refine credit scoring algorithms in relation to Bank A's other credit card products? Would it extend to Bank A's entire range of consumer credit products? (We note that, given the way credit providers manage their credit portfolios, it would be important for a credit provider to have flexibility to use the CDR data to create, review and refine algorithms across their entire consumer credit portfolio).

Based on the wording of "data minimisation principle" in rule 1.8, we consider that the narrow "account interpretation" is likely to be the legally 'correct' interpretation (although, potentially, not the intended interpretation). If this is the case, the principle would severely restrict the benefits that can be obtained from the CDR regime for credit-related use cases and for most other potential use cases.

We note, however, that the consultation paper appears to suggest that the broader "product type interpretation" was intended by the drafters. This is because the paper notes that the current wording of the data minimisation principles "precludes consumers from consenting to ADRs using their CDR data for *research purposes* where it *does not relate to the goods or services requested*" (page 48, emphasis added). As it is unlikely an authorised data recipient would be conducting research in relation to the customer's actual "account" (i.e. contract), we assume this quote supports the broader "product type interpretation" (i.e. the current definition of the data minimisation principle would allow, for example, an accredited data

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[2] Noting that the deidentification process is treated as a 'use' itself, and so would be subject to the same restrictions. In practice, notwithstanding the rules that relate to the use and disclosure of 'deidentified' data, it is unclear how data could be deidentified in the first place as it is unlikely that that "use" (i.e. the process of deidentification) would ever relate to the provision of the good or service to the particular.

[3] A credit scoring algorithm (or model) involves a prediction of the statistical likelihood of a customer defaulting on the credit being applied for, where that prediction is based on the customer's past displayed behaviour (and comparing it to what's known about a large number of previous customers' behaviour and whether they defaulted). That is some past behaviour will statistically suggest a higher likelihood of defaulting on the loan in the future, while other behaviour may suggest a lower likelihood. It is important that a credit provider be able to 'review' the operation of those model (i.e. to assess whether customers who have displayed a particular pattern of behaviour end up performing in the way predicted by the model) and to 'refine' the model (i.e. to add in forms of behaviour to the model that are considered to be predictive, or remove forms that are ultimately not found to be predictive).

[4] It would even interfere with even simple and straightforward uses of the data, such as "verification" of a customer's financial situation. This is because use of data for verification will necessarily involve the use of assumptions and estimates (e.g. to decide what portion of a transaction from 'Woolworths' represents discretionary vs non-discretionary spending). Those assumptions and estimates would need to be tested using the CDR data so that they can be adjusted for *subsequent* credit applications (i.e. not in relation to the provision of the credit product to the particular customer).

recipient to collect and use CDR data to create, review or refine algorithms for the good or service). However, this is far from clear from the wording of the data minimisation principle and, even if it is correct, still leaves considerable doubt as to what would be captured by the meaning of "the" good or service.

> **Recommendation 4:** The data minimisation principle be clarified to confirm that an accredited data recipient may collect and use CDR data to refine or improve the type of "good or service" being requested by the CDR customer, even though this may not impact the provision of the specific account to the customer.

> **Recommendation 5:** The data minimisation principle – or ACCC guidance – clarify the breadth of the term "good or service", noting that this may require additional consultation with relevant stakeholders. In the context of credit, the breadth of "good or service" should reflect that a credit provider will legitimately use the CDR data to refine or improve products across their whole consumer credit portfolio.

Impact of the proposed amendments to allow use of CDR data for research

Our comments in relation to the proposed amendments described in section 7.7 of the consultation paper depend on the approach adopted by the ACCC in relation to ARCA's Recommendations 4 and 5.

If the ACCC adopts those recommendations, the 'research' amendments described in section 7.7 will be of less direct relevance for credit providers' risk and credit management purposes as those purposes will be permitted under the current data minimisation principle (although the research amendments may still be relevant to our Members for other purposes, such as product development that is unrelated to the credit risk of the product).

If the ACCC does not adopt those recommendations, credit providers would, instead, need to rely on the proposed research amendments to undertake tasks that are intrinsic and necessary to the business of providing credit, such as the creation or refinement of credit scoring algorithms. If this is the case, we have the following concerns with the proposed research amendments.

Given the intrinsic and necessary role that tasks such as the creation or refinement of credit scoring algorithms play in the provision of credit it is not appropriate to:

- Require the consent to be separate from the overall collection and use consents (noting our overarching concerns with the consent process, described in *Consent framework: clear and certain ability to access and use CDR data*, above)
- Require the accredited data recipient to describe "any additional benefit to be provided to the CDR consumer for consenting to the use". It is not appropriate to expect a credit provider to provide an additional benefit to a customer to use their data to develop or refine credit scoring algorithms. Requiring a credit provider to address this issue in the consent would simply create an expectation in the customer's mind that they 'deserve' compensation and lead to more customers refusing to provide consent.
- Apply the 'research' purpose to the use of data only, rather than collection <u>and</u> use, as it would be important for a credit provider to collect data in order to test whether it was predictive within their credit models. For example, a credit provider may wish to test a theory that a particular customer attribute (e.g. whether the customer has established direct debit arrangements on their existing credit facilities) is predictive of

whether the customer will repay a new loan. To test that theory, the credit provider would need to collect that data for a cohort of new applications and subsequently review whether the attribute was predictive (i.e. based on a retrospective review of the performance of that cohort of customers). However, under the current drafting of the research permission, the credit provider could not collect the information about direct debit arrangements as it was not 'used' in relation to the particular customer's credit application.

To be clear, we consider that the above observations are strong reasons why credit providers should not need to rely on the research amendments to conduct those tasks, i.e. they should be permitted as being "reasonably necessary in order to provide the requested goods or services". However, if the ACCC does not give effect to Recommendations 4 and 5, we consider that the restrictions and conditions placed on general research must be loosened (particularly where that general relates to the "type" of good or service that has been provided to the customer).

Facilitating the participation of intermediaries

We are broadly supportive of the proposals to allow for the three levels of restricted accreditation.

However, we are concerned that some of the constraints and conditions linked to those forms of restricted accreditation are too complex and restrictive – which will not support the adoption of the CDR by businesses and will cause additional customer confusion.

Importantly, we consider that the rules should recognise two broad ways for a business to use the services of an intermediary in the CDR system:

- As the provider of 'back room' services to the business, where the customer relationship is maintained between the customer and the business, and, as far as the customer is concerned, the involvement of the intermediary is not relevant to the provision of the service. In this case, the consumer would ordinarily see the business as being responsible for the provision of the good or service and, if things go wrong, responsible for those problems.
- As a way for a business to obtain limited benefit out of the CDR system, without needing to fully participate by relying on the service of a specialist, fully accredited provider. In this case, the business is more likely to hand over at least part of the customer relationship to the specialist provider. In doing so, the business would expect to be able to rely on the expertise of the specialist provider to provide the CDR-related parts of the service and to rely on the specialist provider to take responsibility if things go wrong in relation to the CDR (where this would be visible to the customer, who then chooses to either accept the relationship or decline to acquire the good or service).

We consider that the proposed rules (particularly those relating to consent, dashboards and liability for things going wrong) do not properly support either of those models. Importantly, the first model is not properly supported as the consent and dashboard processes involve an overly prescriptive method of obtaining customer consent, which place too much emphasis on the 'back room' services provided by the intermediary (which is likely to cause confusion for customers and reduce the likelihood that they will consent to share data).

Recommendation 6: While we are supportive of the general approach allowing for the restricted forms of accreditation, the constraints and conditions linked to those forms of accreditation should be reviewed and simplified to better support the two broad ways that a business is likely to use the service of an intermediary in the CDR system (as described above).

Disclosure to trusted advisers

In respect to consultation question 16, we note the ACCC's comments during the 22 October meeting that the reference to 'mortgage broker' (as opposed to 'broker') was deliberate and based on the view that the best interest duties under the National Consumer Credit Protection Act (NCCP) applicable to 'mortgage brokers' was a reason to support those brokers inclusion in the list of trusted advisers. With respect, we do not consider that the best interest duties creates any higher standard of conduct that is relevant to the disclosure of CDR data to a "trusted adviser" compared to any other broker that is licensed (or is an authorised representative of a licensee) under the NCCP.

The best interest duty applies to a mortgage broker when providing "credit assistance" only. It does nothing to require the mortgage broker to take any additional steps (again, compared to other brokers) in relation to the security and protection of the data obtained through the CDR. We note also, that the restriction to "mortgage broker" would create a competitive distortion in the broker market as those brokers who happen to be "mortgage brokers" would be able to act as a trusted adviser (and receive CDR data via an aggregator) regardless of whether the customer was seeking broker assistance for a mortgage or for another product.

The relevant standard of conduct is that contained in the general conduct obligations within section 47 of the NCCP (particularly the obligations to act "efficiently, honestly and fairly and to maintain AFCA membership). Those standards of conduct apply to all licensees, not just 'mortgage brokers'.

> **Recommendation 7:** If it is considered that a mortgage broker is suitable as a 'trusted adviser', then this should apply to all brokers under the NCCP.

If you have any questions about this submission, please feel free to contact me on ███████ ██ or at ████████████, or Michael Blyth on ████████ or at ███████████.

Yours sincerely,

Mike Laing
Chief Executive Officer
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